



NYCLU
NEW YORK CIVIL LIBERTIES UNION

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VIA FACSIMILE

August 19, 2008

James Konstanty, Esq.
County Attorney, Otsego County
197 Main Street
Cooperstown, NY 13326-1129
Facsimile: 607.547.7572

Re: Health Care Benefits for Same-Sex Couples

Dear Mr. Konstanty:

I am writing on behalf of the New York Civil Liberties Union to follow up on our Thursday, August 14, 2008 telephone conversation regarding Otsego County's policy on providing health care coverage for same-sex couples. I had called you on August 13 after reading a *Daily Star* article of the same date regarding the county's policy on health care benefits for same-sex couples.

During our conversation, you confirmed that the county's health care plans are fully funded by the county. Indeed, that means the county's health care plans are "governmental" and, thus, excluded from federal law preemption. *See, e.g., Gualandi v. Adams*, 385 F.3d 236, 242-44 (2d Cir. 2004) (citing 29 U.S.C. §§ 1002(32) & 1003(b)). Therefore, state law governs the county's plans.

Under state law, the county's policy—as described in the *Daily Star*—is unlawful. New York's common law, marriage-recognition rule requires the government to respect the valid marriages of same-sex couples married outside the state. *See Martinez v. County of Monroe*, 850 N.Y.S.2d 740 (4th Dep't), *motion for leave dismissed*, 10 N.Y.3d 856 (2008).¹ In addition, the Executive Law prohibits discrimination based on sexual orientation. *Id.* (citing N.Y. Exec. Law § 296). Thus, the county's reported policy is unlawful because it categorically excludes all same-sex couples from eligibility for health care coverage. Yet county employees who are members of married same-sex couples must be entitled to the same spousal health care benefits available to all other county employees. *See Martinez*, 850 N.Y.S.2d at 741-43.

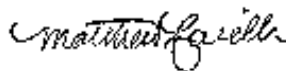
Also, during our conversation, you advised that the NYCLU would need to submit a Freedom of Information Law ("FOIL") request to the Clerk of the Board in order to receive the county's written health care policy. We are making that request and attached is a copy of it. You also stated that, if we believed the county's policy is unlawful, we should sue the county. If the county's policy is, in fact, what was described in the *Daily Star* article, the NYCLU is prepared to

¹ As the only Appellate Division decision to address the issue, *Martinez* is binding on all state trial courts. *See, e.g., Mountain View Coach Lines, Inc. v. Storms*, 476 N.Y.S.2d 918, 919-20 (2d Dep't 1984) ("the doctrine of *stare decisis* requires trial courts in this department to follow precedents set by the Appellate Division of another department until the Court of Appeals or this court pronounces a contrary rule"). *Cf. Funderburke v. NYS Dep't of Civil Serv.*, 854 N.Y.S.2d 466, 469-70 (2d Dep't 2008) (vacating a trial court decision that conflicted with *Martinez* because that trial court decision could have adverse effects on the plaintiffs and "caus[e] confusion of the legal issues in this area of the law").

sue. I will emphasize, however, that the NYCLU would prefer that the county swiftly amend the policy to conform with the law.

In addition, copied on this letter are John Corcoran—counsel retained to provide the county with an advisory opinion on this matter—as well as the New York State Attorney General’s Office, as this matter involves a violation of state law. Please notify me immediately if you have any questions.

Sincerely,

A handwritten signature in cursive script that reads "Matthew Faiella".

Matthew Faiella

CC: John Corcoran, Esq., Partner, Hancock & Estabrooks, LLP
Alphonso David, Esq., Deputy Bureau Chief, New York State Attorney General’s Office,
Civil Rights Bureau